IN THE SUPREME COURT OF MISSOURI
No. SC94253

DEBORAH BARKLEY
Appellant,

vs.

McKEEVER ENTERPRISES, INC. d/b/a PRICE CHOPPER
Respondent.

TRANSFER FROM THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE JAMES F. KANATZER
DIVISION 5

SUBSTITUTE REPLY BRIEF OF APPELLANT

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REPLY TO RESPONDENT'S STATEMENT OF FACTS

Respondent's Statement of Facts reluctantly concedes that before any of the batteries occurred its LPO's had recovered the merchandise, searched Plaintiff and her processions to see if additional merchandise was concealed and obtained identification information concerning Plaintiff. (Respondent's Brief Page 4). Respondent also concedes that after investigating whether Plaintiff concealed merchandise, and after recovering the merchandise, its LPO's thereafter continued to detain Plaintiff while they engaged in "paperwork" that included preparing a narrative report, photographing Plaintiff and the merchandise, preparing a Notification of Apprehension and Trespassing and a Missouri Civil Demand Notice. (Respondent's Brief Page 4). The batteries were committed in the course of this "paperwork". Thus, Respondent acknowledges and confirms that at the time its LPO's battered Plaintiff, she was not being detained for either of the purposes described or protected by § 537.125, RSMo.

Further, Respondent's Statement of Facts demonstrates that its arguments and contentions are based on the premise that Respondent's policies and practices (such as not allowing a detainee to make a telephone call, photographing suspects for its trespass book, preparing a narrative report and issuing a Civil Demand to suspects before they are released) are to be accorded the status of Law such that anyone who disregards them is committing an unlawful act and thereby authorizing a merchant to use force to secure compliance. Respondent cites no competent authority for this position and clearly it is not and should not become Law.

REPLY TO POINT I ARGUMENT B (1)

Respondent contends that §537.125, RSMo vests a merchant with protection for the use of reasonable force to detain a patron pending the arrival of law enforcement officials. Although Respondent's defense of Instructions 9 and 10 is ostensibly predicated upon § 537.125 RSMo, Respondent's argument ignores the express language of the statute and seeks to modify and supplement the language of the statute, by expanding the authorized purposes for which a patron may be detained, in order to support its claims and justify the erroneous instructions given by the Court.

For clarity, the full text of § 537.125, RSMo is set forth below (emphasis is added by Appellant):

SHOPLIFTING--DETENTION OF SUSPECT BY MERCHANT--

LIABILITY PRESUMPTION.

537.125. 1. As used in this section:

(1) "Mercantile establishment" means any mercantile place of business in, at or from which goods, wares and merchandise are sold, offered for sale or delivered from and sold at retail or wholesale;

(2) "Merchandise" means all goods, wares and merchandise offered for sale or displayed by a merchant;

(3) "Merchant" means any corporation, partnership, association or person who is engaged in the business of selling goods, wares and merchandise in a mercantile establishment;

(4) "Wrongful taking" includes stealing of merchandise or money and any other wrongful appropriation of merchandise or money.

2. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed or is committing a wrongful taking of merchandise or money from a mercantile establishment, may ***detain*** such person in a reasonable manner and for a reasonable length of time ***for the purpose of investigating whether there has been a wrongful taking*** of such merchandise or money. Any such reasonable detention shall not constitute an unlawful arrest or detention, nor shall it render the merchant, his agent or employee, criminally or civilly liable to the person so detained.

3. Any person willfully concealing unpurchased merchandise of any mercantile establishment, either on the premises or outside the premises of such establishment, shall be presumed to have so concealed such merchandise with the intention of committing a wrongful taking of such merchandise within the meaning of subsection 1, and the finding of such unpurchased merchandise concealed upon the person or among the belongings of such person shall be evidence of reasonable grounds and probable cause for the ***detention*** in a reasonable manner and for a reasonable length of time, of such person by a merchant, his agent or employee, ***in order that recovery of such merchandise may be effected***, and any such reasonable

detention shall not be deemed to be unlawful, nor render such merchant, his agent or employee criminally or civilly liable.

4. Any merchant, his agent or employee, who has reasonable grounds or probable cause to believe that a person has committed a wrongful taking of property, as defined in this section, and who has detained such person and investigated such wrongful taking, may contact law enforcement officers and instigate criminal proceedings against such person. Any such contact of law enforcement authorities or instigation of a judicial proceeding shall not constitute malicious prosecution, nor shall it render the merchant, his agent or employee criminally or civilly liable to the person so detained or against whom proceedings are instigated.

Clearly this statute does not expressly include authorization to detain a person pending the arrival of a law enforcement official. Respondent merely assumes that such authorization was either intended or should be inferred. The Supreme Court of Arizona addressed this issue in reverse in one of the cases cited by Respondent. The Arizona Court noted that "the Restatement rule allows for detention for "investigation of the facts," while the Arizona statute allows for detention "for questioning or summoning a law enforcement officer" Of course, we adopt the statutory test." *Gortzrez v. Smitty's Super Val. Inc.*, 680 P. 2d 807, 814-815 (Ariz. 1984). Missouri's stature does not allow detention for summoning law enforcement. Respondent's inferences are not supported by the Restatement or the law and have no merit.

As Respondent's Statement of Facts shows, at the time Deborah Barkley was battered neither of protected activities were under way. Respondent strains to justify its position by employing mere rhetoric. Respondent suggests that it, as a merchant, is somehow possessed of the power by virtue of § 537.125 RSMo to use force to prevent a suspect "from fleeing prosecution" (Respondent's Brief Page 13) which simply misstates the statute. It argues that the "statute does not limit the reasonable manner and reasonable length to simply determining that the person has concealed merchandise or to only prevent the person from leaving with the merchandise from the store". (Respondent's Brief Page 17) Yet, that is exactly what the statute does. By its express terms the statute only protects detention for two purposes; for ***investigation to determine whether there has been a taking*** and ***recovering merchandise***. By specifying and identifying these purposes, the legislature has thereby excluded other purposes. *See Brown v. Morris*, 290 S.W.2d 160(Mo.1956), *Kroger Grocery & Baking Co. v. St. Louis*, 106 S.W.2d 435(Mo.1937) (holding that where special powers are expressly conferred other powers are excluded).

The undisputed evidence shows that Respondent's protected activities (investigating whether there had been a wrongful taking and recovery of the merchandise) were completed before its LPOs battered plaintiff. It also shows that Respondent's LPOs did not need to batter Deborah Barkley to successfully cause her to be prosecuted. They battered her because they were not qualified, by training or personality, and because they felt free to impose their will upon Appellant as though their actions comported with the law. As discussed below, Respondent describes a patron's failure or refusal to follow its instructions after the statutorily protected activity is complete as constituting an unlawful

act, which simply is not the law. Respondent provides no authority whatsoever in support of this proposition. Expanding the merchant's privilege to include forcible detention pending prosecution, as suggested by the Respondent, would transfer important law enforcement functions from highly trained impartial officials to lightly trained, highly partial and sometimes clearly volatile individuals, such is not and should not become the law. Detention for the purpose of prosecution is a matter for trained law enforcement personnel, not private entities or their employees.

REPLY TO POINT I ARGUMENT B (2)

In subpart B (2) of Point I, Respondent again presents arguments predicated upon an expansion of the merchant's privilege provided by § 537.125, RSMo. It argues again that the statute authorizes the employment of force to prevent a suspect from fleeing to "avoid prosecution". (Respondent's Brief Page 17). For the reasons stated above this argument has no merit.

Respondent next addresses the issue of the applicability and modification of M.A.I. 32.10, which on its face requires proof that a battery was committed to prevent or resist an *unlawful* act. Since the evidence clearly demonstrates that Deborah Barkley was not engaged in any criminal conduct at the time she was battered, Respondent suggests that the *"unlawful"* act was, and under the law could be, either a refusal to follow an LPO's instructions or attempting to flee after the statutorily protected activities were completed. (Respondent's Brief Page 18). Respondent makes no attempt to explain how, or even support the proposition that such acts were, *"unlawful"*. In fact Respondent totally ignores this issue. Instead, Respondent engages in reference to the Restatement of Torts Second

concerning the use of force to prevent or terminate an actor's intrusion upon chattels. These citations are mere diversion intended to both cloud and avoid focus upon the fact that Respondent's Instruction No. 10 does not hypothesize an *unlawful* act as required by M.A.I. 32.10 and that Respondent made unauthorized modifications to an approved instruction. Those modifications include failing to submit the same allegedly unlawful act in both Paragraph First and Third of the Instruction, as well as failing to hypothesize an actual unlawful act. Respondent admits that Instruction 10 was a modified version of M.A.I. 32.10 and offers no rationale or justification for its failure to identify and support such modifications as required by Rule 70.02.

To its credit, Respondent candidly admits that no Missouri case supports the giving of M.A.I. 32.10 in the context of this case. (Respondent's Brief Page 24) It also admits that the batteries were not committed to actually resist an invasion upon its chattels, as M.A.I. 32.10 is intended to address, but were committed to prevent Appellant from fleeing after it had completed its investigation. (Respondent's Brief Page 24) In essence, Respondent asks this Court to completely rewrite

§ 537.125, RSMo so as to completely restate and greatly expand the merchant's privilege. This request is neither warranted nor authorized and should be denied.

REPLY TO POINT I ARGUMENT B (3)

Respondent's argument that Appellant was not prejudiced because she did not prove actual physical injury ignores the nature of the cause of action submitted to the jury. Because battery is an intentional tort, actual damages are presumed and Plaintiff did not have to prove diagnosable damages. *See A.R.B. v. Elkin,*98 S.W.3d 99 at 104 (Mo. Ct.

App.2003), *Conway v. Kansas City Public Service Co.,* 125 S.W.2d 935(Mo. Ct. App.1938). Further, as Respondent itself acknowledges, Instruction 10 clearly confused the jury and was misunderstood by the jury. (Respondent's Brief Page 28) Respondent concedes that under the instructions as given, if the jury found that the alleged attempt to flee justified the use of reasonable force, then the jury should have, at the very least, returned a verdict in favor of Plaintiff as to the first battery since it occurred prior to the alleged attempt to flee, yet the jury did not do so. Clearly this result was a product of an instruction which was confusing, not supported by the evidence and which failed to state the applicable law.

REPLY TO POINT II

Preservation for Review

Respondent's claim that Appellant somehow failed to preserve the issue of the sufficiency of the evidence to support instruction Number 10 is without merit. Appellant asserts that the Court erred in giving Instruction Number 10 because it was not supported by the evidence. During the formal instruction conference Appellant objected that Instruction Number 10 was not supported by the evidence. (Tr. Vol. II at 863-864) Thus, Appellant is not asserting a new challenge as claimed by Respondent. Appellant's argument in support of this Objection was made during the informal conference to which the Court alluded during its ruling on Plaintiff's Objection. (Tr. Vol. II at 867) As is the custom, that conference was not on the record. At the formal instruction conference Plaintiff again stated her Objections and her contentions on appeal follow and are entirely consistent with those Objections.

Giddens v. Kan. City S. Ry. Co., 29 S.W.3d 813(Mo.2000), relied upon by Respondent in support of its preservation argument, is clearly inappropriate. In *Giddens* this Court considered a challenge to the constitutionality of a FELA damage instruction and held that the Respondent therein had failed to preserve the constitutional issue by failing to cite "to provisions of the Missouri Constitution…allegedly violated" and failing to "argue how they are violated." (Giddens, 29 S.W. 3d at 823)

Harmless Error

Respondent's second response to Appellant's Point II argues that "if error occurred, it was harmless error." (Respondent's Brief Page 27-28) By making this argument, Respondent continues to simply ignore the fact that the instruction directed a verdict for Respondent on the basis of facts which were not supported by, and were conclusively disproven by, the evidence. Even Respondent admits that the verdict does not comport with the evidence or the instruction stating: "If the jury was instructed that Respondent's use of force against Appellant was only justified if it was to prevent her from fleeing, then the jury should have returned a verdict in favor of Appellant as to the prior alleged batteries." That is the point. The jury was not so instructed. Instead, it was instructed that it could apply the "fleeing" justification to both batteries. The jury is presumed to have followed this instruction, to Plaintiff's clear and obvious prejudice. *State v. Hashman,* 197 S.W. 3d 119, 134 (Mo. Ct. App. 2006), citing *State v. Davis*, 122 S.W. 3d 690, 693 (Mo. App. 2003).

REPLY TO POINT III

Inadmissible Evidence

The testimony to which Appellant objected was that Deborah Barkly "wanted to get out of jury duty". In an effort to avoid Appellant's argument and soften the inflammatory effect of the actual testimony, Respondent recasts Appellant's claim and mischaracterizes the testimony complained of by referring to it as "Dr. Gillbanks had twice excused Barkley from jury duty" (Respondent's Brief Page 30). The distinction is important. The Doctor's testimony at trial, which Respondent worked so hard to get admitted into evidence, was that "she wanted to get out of jury duty." (Tr. 820-822) Respondent's focus was that Appellant wanted to get out of jury duty, not that she couldn't serve or had the physical inability to serve. Any such phrase is unduly prejudicial and legally irrelevant; however, the admitted phrase is more so as it conveys the impression that Appellant did not want to do her duty, not that she physically could not. The testimony was not used by Respondent to argue that Appellant was in poor physical condition prior to the battery, rather, the testimony was used to form the basis of Respondent's improper closing argument. Respondent's clear purpose was to prejudice the jury as evidenced by its use of nearly identical language, stating to the jury in final argument "… when you guys got your summons to come, you honored it and you didn't try to get out of it. Thank you for coming." (Tr. 921) Typically trial counsel will thank a jury for its service, but not go to lengths to point out that the jury didn't "try to get out of" jury duty. The evidence that Appellant "tried to get out of jury duty" once improperly admitted continued to prejudice Appellant to the end of trial. This prejudice to Appellant is directly proportional to

Respondent's insistence and tenacity in seeking admission of this testimony in pre-trial arguments and arguments at trial in opposition to Appellant's objections. The manner in which it was used in closing argument demonstrates the importance Respondent gave the evidence as well as the prejudice suffered by Appellant.

Respondent offers no persuasive argument that Dr. Gillbanks' testimony, that Mrs. Barkley "wanted to get out of jury duty", is either logically or legally relevant. Such evidence was not offered to impeach or otherwise contradict Appellant. Respondent argues at page 31 of its brief that "at Trial, Appellant conceded for the first time that she did not relate her post-incident medical condition to the incident at Price Chopper (Tr. Vol. I, P. 438, Vol. 2, PP. 290-94)." There is no factual basis for this statement, it was merely Respondent's argument, and Respondent misrepresents the record in an effort to somehow justify the improper admission of Dr. Gillbanks' inflammatory testimony which offers scant, if any, additional evidence of her previously admitted and well documented condition. The evidence was obviously offered solely for the purpose of attacking Appellant's character and to significantly prejudice Appellant in the eyes of the Jury.

This objectionable evidence was not invited by Appellant's evidence and Appellant's counsel objected to it at every opportunity, it should have been excluded. The prejudicial nature and effect of Dr. Gillbanks' testimony is so substantial, that it warrants reversal.

The Evidence Was Unnecessary

Respondent argues that Dr. Gillbanks' testimony was appropriate to demonstrate that Appellant could not sit for long periods of time prior to the batteries. That assertion is

questionable at best and becomes clearly non-meritorious considering that Plaintiff's medical condition prior to the incident was never in dispute and there was substantial non-prejudicial evidence that Respondent could have used to bolster this point. Respondent's own recitation of the doctor's other testimony and records which state that: Appellant had "musculoskeletal problems and was unable to sit for any length of time" and "she spent a lot of time in bed and in her recliner" and "in 2011 she continued to have chronic pain with any amount of being in one position" shows prolific instances of non-prejudicial evidence of Appellant's prior condition. Appellant concedes that non-prejudicial testimony by the doctor and the prior medical records were relevant to Appellant's prior medical and physical condition and thus properly admissible. Respondent could have legitimately used such evidence to show Appellant's prior condition without resorting to the use of the prejudicial statements concerning her "getting out of jury duty" which served no legitimate purpose and caused unwarranted prejudice against Appellant.

Respondent also argues that Plaintiff was not hurt by the battery. The videotape of the incident dramatically shows Appellant being grabbed, wrestled with, having her leg kicked out from under her and slammed to the tile floor by Respondent's employees who then forced her to stay on the floor in an awkward position, all of which did in fact cause injury. (Exhibit 1, part 10) Dr. Gillbanks stated the obvious in testifying that "if someone hit her neck, I would expect her to hurt." Appellant testified that multiple parts of her body were traumatized, but she did not claim permanency. (Tr. p. 438) Appellant was certainly entitled to claim and prove physical injury as a result of the trauma inflicted upon her which is vividly demonstrated in the videotape. Neither Appellant nor her counsel,

however, ever attempted to minimize her prior physical condition which was well documented in the medical records and Dr. Gillbanks' testimony that she "wanted to get out of jury duty" was clearly not the best evidence of her prior condition . Further, the fact the Doctor opined that she could not serve on a jury demonstrates no improper motive on the part of Appellant. Appellant's testimony at Trial was not at all inconsistent and Appellant's counsel freely and frequently conceded her prior injuries, medical condition and prior medical treatment. There was ample evidence in the record to prove Appellant's poor pre-existing physical condition without unnecessarily and collaterally injecting this prejudicial testimony.

Due Process Argument

Respondent suggests that Appellant's claim is a "due process" claim and that the Court should not consider it because it was not raised in the Points Relied On. This is simply another effort by Respondent to recast Appellant's argument. Appellant's point does in fact state that that her "right to a fair and impartial jury" was prejudiced. The Appellant's purpose for addressing the issue, however, was to show prejudice resulting from the inadmissible evidence as required for reversal. The importance to Respondent of the testimony is demonstrated by Respondent's continuous efforts in seeking the admission of this prejudicial evidence at the start of trial and during trial and the ultimate use to which it put the evidence in closing argument. The prejudice is also demonstrated by Respondent who claims in its brief that the Jury was only out 56 minutes for deliberations. A Jury unduly prejudiced against a party would be unlikely to deliberate long and would not take the necessary time to weigh the evidence. As intended by the Respondent, the Jury was

prejudiced by the improper evidence and Appellant's right to a fair and impartial Jury was not protected.

Closing Argument

Respondent's counsel stated in closing argument: "We're very concerned and very appreciative of the fact that when you guys got your summons to come, you honored it and you didn't try to get out of it. Thank you for coming." Respondent contends this statement was not timely objected to and therefore any objection was waived. The Court of Appeals recently reviewed contentions of error regarding improper argument in *Peterson v. Progressive Contrs., Inc.,* 399 S.W.3d 850(Mo. Ct. App.2013). The Court in *Peterson* stated:

> "Generally, 'When a party fails to object to an allegedly erroneous argument at the time it is made, his claim of error is foreclosed from consideration.' *Peters v. Henshaw,* 640 S.W. 2d 197, 201 (Mo. App. W.D. 1982)(citing *Mueller v. Storbakken, 583 S.W. 2d* 179, 186 (Mo. Banc 1979)) (emphasis added.)
>
> *Peterson*, 399 S.W.3d at 857.

In the present case it is clear that throughout the Trial, Respondent sedulously sought the admission of Dr. Gillbanks' testimony that Appellant "wanted to get out of jury duty" in order to use it as substantial evidence in the case and in closing argument. Respondent's closing argument was clever. It did not expressly state that Plaintiff sought to get out of jury duty. However, it reminded the jurors that Plaintiff twice got out of jury duty and specifically and expressly thanked the jurors in her case for not getting out of jury duty

themselves. Those were the Respondent's last words to the jury and clearly expressed at a time to have the greatest impact upon the jury. Further, the comments went well beyond the typical statements of counsel in expressing appreciation for a jury's time and consideration.

If the Court finds that an objection was not made during the closing argument, it may and should still review Appellant's argument under the plain error doctrine of review. The *Peterson* Court held that:

> "plain errors affecting substantial rights may be considered on appeal, in the discretion of the Court… when the Court finds that manifest injustice or miscarriage of justice has resulted therefrom". Rule 84.13(c). Plain error is evident, obvious and clear error. *In re Estate of Werner*, 133 S.W.3d 108, 111 (Mo. App. W.D. 2004).
>
> Peterson, 399 S.W.3d at 861.

In the case at bar Respondent makes no effort to justify its statement made to the jury at the close of Respondent's argument. It was clearly an improper argument intentionally crafted by Respondent to be highly inflammatory and prejudicial. Although the Court in *Peterson* went on to state that plain error was not appropriate in that case, the facts in this case are to the contrary and plain error review is warranted. The comments made in closing argument by Respondent were not invited by Mrs. Barkley and were wholly inappropriate. The Respondent expended much effort and argument to improperly inject the prejudicial testimony of Dr. Gillbanks into evidence in the first place. Its efforts resulted in an improper ruling by the Trial Court. Dr. Gillbanks' statements were admitted into evidence and the improper closing argument of Respondent was set up. This Court should not

sanctify this intentional improper closing argument simply because Appellant's counsel failed to object.

The consequence of Respondent's efforts to unfairly prejudice the jury by obtaining the admission of improper evidence and then improperly arguing it should be this Court's Order reversing the Trial Court and remanding the case for a new trial.

REPLY TO POINT IV

Refusal To Admit Barkley's Exhibits 88, 89, And 90 And The Rizo Case File

Respondent, for the first time, argues that Exhibits 88, 89, and 90 are not so connected with or sufficiently similar so as to be relevant. The issue first arose in Respondent's Motion in Limine, (L.F. 10, paragraph 3) when Respondent was anticipating that Appellant would seek the admission of evidence that Mr. Herrington was written up "for similar acts" after the incident. (L.F. 15) At trial Respondent's argument was not that the other incidents were dissimilar, but that they were incidents that occurred after the Barkley incident. (L.F. 14, paragraph 3) The Trial Court's only ruling on the issue was that the prejudice outweighs the probative value (Tr. 63 and 854). The reasons given by counsel at trial (L.F. 14, paragraph 3 and Tr. 23-27) did not address similarity.

Exhibits 88, 89, and 90 were reports of similar conduct by Mr. Herrington and were admissible to show the Respondent's conscious disregard for the safety of Appellant and other customers, and employing a security guard who has repeatedly and continuously demonstrated similar aggressive behavior of which Appellant complains. The circumstances surrounding the other occurrences were sufficiently similar to make them admissible in this case. That objection simply was not made with respect to these Exhibits

and the Trial Court didn't consider it. Evidence of conduct occurring during subsequent or prior events is relevant and admissible under an issue of punitive damages if they are so connected with the particular acts as tending to show the Respondent's disposition, intention, or motive and the commission of the particular acts for which damages are claimed. *Letz v. Turbomeca Engine Corp.*, 975 S.W.2d 155 (Mo. Ct. App. 1997). When such intent is the focus of the inquiry, "evidence should be allowed to take a wide range". *Brockman v. Regency Fin. Corp.*, 124 S.W. 43 (Mo. Ct. App. 2004). The Trial Court's rulings were prejudicial to Appellant and should be reversed.

To the extent that Respondent argues that the evidence of Mr. Herrington's prior and subsequent similar misconduct purports to impeach his character or impugn his reputation, it is misplaced. Rather, Mrs. Barkley sought to offer evidence of his other similar conduct to show Respondent McKeever's state of mind and lack of caring for the way it treats its customers by keeping Mr. Herrington in his role as a security guard for the store. Respondent's case citations inappositely pertain to the admission of reputation in a fraud case and other negligence cases. Respondent does cite a 1968 battery case, *Parker v. Wallace*, 431 S.W.2d 136, 140 (Mo. 1968) (citations omitted). However that case is of no support to Respondent because although it stated that "ordinarily, evidence of the reputation of a Respondent in a civil assault and battery case is not admissible), *Id.* at 140, Appellant did not offer the excluded evidence to prove Mr. Herrington's bad character. Respondent again recasts Appellant's argument in an effort to make a response to a fictitious argument and ignore the real issue on appeal to which it does not respond.

Excluding Evidence Of Respondent's Involvement

In The *Rizo V. Mckeever Enterprises, Inc. Case*

The Court erred in excluding evidence of Respondent's involvement in the *Rizzo v. McKeever Enterprises* case. Respondent argues that the *Rizzo* case file does not meet the test for relevance. Respondent supports its conclusory statement primarily with a citation to a medical malpractice negligence case. This, of course is not a negligence case, and Respondent's reliance on such a case does not support its position. In this case, Mrs. Barkley was offering such evidence in support of her submission of punitive damages to the jury. The evidence was relevant for such purpose and the Trial Court erred in refusing it. The error was prejudicial and the case should be reversed and remanded for a new Trial.

CONCLUSION

Despite clear evidence of multiple batteries inflicted upon Appellant, the jury found for Respondent. That finding was the result of improper instructions, the exclusion of relevant, material evidence which would have documented Respondent's excessive and unlawful practices and the admission of irrelevant, prejudicial evidence which was intended to and did cast Appellant in a bad light in the eyes of the jury. For these reasons, the Judgment in favor of Respondent must be set aside and Appellant must be awarded a new Trial on all issues.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the foregoing Appellant's Reply Brief complies with the limitations contained in Rule 84.06 and that:

(1) The signature block above contains the information required by Rule 55.03;

(2) I hereby attest that I have on file all holograph signatures for any signatures indicated by a "conformed" signature (/s/) within this e-filed document.

(3) The brief complies with the limitations contained in Rule 84.06(b).

(4) The brief contains 4,930 words, as determined by the word count feature of Microsoft Word.

I further certify that copies of the foregoing have been served on counsel of record identified below by the electronic filing system on October 10, 2014 and that two (2) paper copies were mailed to Respondent.

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